

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK J. MULLER

Appeal No. 1997-1726
Application No. 08/401,077

HEARD: April 7, 2000

Before JOHN D. SMITH, PAK, and KRATZ, Administrative Patent Judges.

JOHN D. SMITH, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal pursuant to 35 U.S.C. § 134 from the final rejection of claim 4, the sole remaining claim on appeal.

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Appealed claim 4 is reproduced below:

4. A method for testing and analyzing a biological test fluid comprising

- introducing into at least two chambers of a microtitration unit, different test reaction mixtures, comprising agar-agar nutrient medium, test microorganisms and a microbial growth indicator, said microtitration unit having at least one container of transparent material, the container including an opening for the introduction of test reaction mixtures and biological test fluid and at least one partition subdividing the container into said at least two chambers for accommodating said biological test reaction mixtures, the at least one partition extending from the inside of the container bottom and being of lower height than the internal height of the container and above the filling levels of the different test reaction mixtures,

- adding a sufficient amount of biological test fluid to be tested or analyzed whereby the biological test fluid flows over the top edge of at least one partition whereby the biological test fluid floods over the at least two chambers and the biological test fluid makes contact with the different test reaction mixtures, and

- detecting the results of the interactions of the biological test fluid with different test reaction mixtures.

As evidence of obviousness, the examiner relies upon the following prior art references:

| | | |
|--------------------------|-----------|------|
| Fisk | 2,874,091 | Feb. |
| 17, 1959 | | |
| Poole | 3,126,325 | Mar |
| 1964 | | 24, |
| Lameris et al. (Lameris) | 3,941,658 | Mar |
| 2, 1976 | | |

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Abdou 4,247,634 Jan. 27,
1981

The appealed claim stands rejected under 35 U.S.C. § 103 as unpatentable over the combined teachings in Fisk, Lameris, Poole, and Abdou. We cannot sustain the stated rejection.

The subject matter on appeal is directed to a method for testing and analyzing a biological test fluid (e.g., milk which contains different medicament residues¹) comprising, inter alia, the step of introducing different test reaction mixtures made up of agar-agar nutrient medium, test microorganisms and a microbial growth indicator (i.e., a color indicator) into at least two chambers of a microtitration unit. According to the specification at page 4, lines 8-10, the different test reaction mixtures are suitable for indicating different medicament residues in biological fluids to be tested. Moreover, appellant's counsel confirmed at oral

¹ The specification contains no working examples, nor does it identify any specific medicament residues to be tested and analyzed. Based on appellant's mention that milk is a biological fluid for testing, we presume that medicament residues of antibiotics such as different types of penicillin residues used and typically found in milk are contemplated. See Lameris at column 1, lines 7-10.

hearing that the appealed claim is limited to a process for determining the presence or absence of a plurality of different medicament (antibiotic) residues in a biological test fluid. See the brief at page 5 and the specification at page 4, lines 8-10. The microtitration unit is defined structurally as a container including at least one partition which subdivides the container into at least two chambers for accommodating the different test reaction mixtures. Additionally the partition extends from the container bottom to a height above the filling levels of the different test reaction mixtures. After introduction of the different test reaction mixtures into the chambers, a sufficient amount of biological test fluid (e.g., an antibiotic residue containing milk) is added so that it flows over the top edge of the partition to flood the different test reaction mixtures in the defined chambers. Finally, the results of the interactions of the biological test fluid with the different test reaction mixtures are detected, e.g., by observation of color changes in the chambers. See the specification at page 3, lines 3-9.

As evidence of obviousness of the claimed method, the examiner relies upon the combined teachings in the relied upon

references. Upon our independent review of the prior art, we find that the disclosures in Lameris, particularly at column 6, line 22 to column 7, line 47 are particularly relevant to the claimed testing and analyzing method with respect to the manipulative steps per se. However, while Lameris suggests, at best, that a series of tests in a number of test vessels, such as in a block of translucent material provided with a number of holes shaped to form test vessels, may be conducted to rapidly determine the presence or absence of residues of antibiotic in liquids such as milk, Lameris contains no suggestion that such a procedure should be carried out in a microtitration unit as structurally defined in the appealed claim. Moreover, although Fisk arguably describes such a structure (see the Figure 2 embodiment of Fisk), the examiner has provided no persuasive reasoning or referred to any objective evidence explaining why one of ordinary skill in this art would have been led to carry out the Lameris process in the Fisk culturing device. Finally, we find no teaching in the applied prior art references wherein a biological test fluid is added to different test reaction mixtures by flowing it over the top edge of a partition of a container of a

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microtitration unit to flood the chambers containing the different test reaction mixtures as required by the claimed "adding" step in appellant's process.

The decision of the examiner, accordingly, is reversed.

REVERSED

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| JOHN D. SMITH |) | |
| Administrative Patent Judge |) | |
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| |) | BOARD OF PATENT |
| CHUNG K. PAK |) | APPEALS |
| Administrative Patent Judge |) | AND |
| |) | INTERFERENCES |

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PETER F. KRATZ)
Administrative Patent Judge)

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APJ JOHN D. SMITH

APJ KRATZ

APJ PAK

DECISION: REVERSED

Send Reference(s): Yes No
or Translation (s)

Panel Change: Yes No

Index Sheet-2901 Rejection(s):

Prepared: June 22, 2001

Draft Final

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OB/HD GAU

PALM / ACTS 2 / BOOK

DISK (FOIA) / REPORT